Supreme Court
FILED

(1)

99 575 OCT - 4 1999

No._____ OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2000

MORETON ROLLESTON, JR. LIVING TRUST,ET AL,
Petitioners,

vs.

ESTATE OF REBECCA WIGHT CHERRY SIMS,
JOHN RANDOLPH CHERRY, EXECUTOR,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF GEORGIA

PETITION FOR WRIT OF CERTIROARI

Moreton Rolleston, Jr.
Attorney for Petitioners
Georgia Bar No. 613700
2035 Garraux Rd., N.W.
Atlanta, Georgia 30327
404/ 237-03666

54 P

QUESTIONS PRESENTED FOR REVIEW

1.

The order of the trial court violated the principle set forth in **Grupo Mexicano de Desarrillo, S.A., et al, vs. Alliance Bond Fund, Inc. Et Al**, No. 98-231which was decided by this Court on June 17, 1999 (hereinafter "**Grupo**"). (U.S. Law Week, Vol. 67, page 4490) The trial court issued a temporary and permanent injunction against the Petitioners (hereinafter "Trust") in a lawsuit brought by a creditor (Respondent) which prevented Trust from disposing of any of its assets. **Grupo** held as follows:

> "Because such a remedy was historically unavailable from a court of equity, we hold that the District Court had no authority to issue a preliminary injunction preventing petitioners from disposing of their assets pending adjudication of respondents' contract

claim for money damages. We reverse the judgment of the Second Circuit and remand the case for further proceedings consistent with this opinion."

2.

The opinion of the Court of Appeals of Georgia (A-1) constitutes impermissible restrain of trade and places a destructive burden on interstate commerce. The Court held that the owner of real estate could not convey good title while a claim against the owner was pending in court unless the owner had not only sufficient assets to cover the pending claim but also assets whose value would exceed any possible other claims for damages. Such a requirement would not only chill the sale of real estate but would also place a requirement which could not even be fulfilled in most cases.

The first question for review is whether the lower court violated the principal enunciated in **Grupo**

The second question for review is whether the requirement of the lower court that a seller of real estate must have assets to cover any possible claims violated the Commerce Clause of the U.S. Constitution. (Article 1, Paragraph 8, U.S. Constitution)

LIST OF PARTIES

Moreton Rolleston, Jr. Living Trust, Moreton Rolleston, Jr. Individually, Moreton Rolleston, Jr as Trustee (Petitioners).

TABLE OF CONTENTS

Page(s)

1. Questions Presented

   For Review..... (i)

2. Table of Authorities.....(v)

3. Statutes and Constitutional

   Provisions.....(vi)

4. Grounds on Which Jurisdiction-

   is Envoked..... 2

5. Date of Opinion of the Court of

   Appeals of Georgia..... 5

6. Statutory Jurisdiction..... 2

7. Appendix A..... A-1

8. Appendix B..... B-1

TABLE OF AUTHORITIES

Page

CASES

Gormley vs. Askew, 18

177 Ga. 554, headnote 1

Graves vs. Horton, 18

132 Ga. 786

Grupo Mexicano de Desarrillo,

s.a., et al, vs. Alliance Bond

Fund, Inc. Et Al (i), (iii), 3,

N. 98-231 5, 8

Kessler vs. Veal 18

182 Ga. Apps 444, at page 449

Mitchell vs. Langley 18

148 Ga. 244 at page 246

Pharr vs. Pharr, 17

206 Ga. 354, p. 360

Roach vs. Roach, 18

212 Ga. 40, p. 42

Stokes vs. McRae, et al, 17

247 Ga. 658, page 659

Wallace, Executor, et al vs.

Williams, 17

212 Ga. 692, page 696

Warren vs. Citizens National Bank

of Danville, Ky. 17

145 Ga. 503

STATUTES

	Page
28 U.S.C. 1257	2
O.C.G.A. § 18-2-22 (3)	8, 9

CONSTITUTIONAL PROVISIONS

Article 1, Paragraph 8, U.S. Constitution	(iii), 2

No._____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2000

======

MORETON ROLLESTON, JR. LIVING TRUST,ET AL,

Petitioners,

vs.

ESTATE OF REBECCA WIGHT CHERRY SIMS, JOHN RANDOLPH CHERRY, EXECUTOR,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF GEORGIA

The trial court granted a Motion for Summary Judgment in favor of the Respondent (Sims Estate). The Court of Appeals of Georgia affirmed the trial court's ruling and denied a Motion

for Reconsideration. A Petition for Writ of Certiorari was filed in the Georgia Supreme Court which was denied by that Court on September 17, 1999.

The jurisdiction of this Court to review the judgment of the Court of Appeals of Georgia is invoked under 28 U.S.C. ¶1257.

Grounds for jurisdiction is violation of Commerce Clause of U.S. Constitution.

STATEMENT OF CASE

Facts Re First Question

Sims Estate filed a damage suit against the Trust and Petitioner Rolleston. While that damage suit was pending, the lower court issued a temporary and permanent injunction against the Trust which prevented any sale of property while

the lawsuit was pending. That order was issued in 1997 and is still in effect.

In **Grupo** case, this court held "that the District Court had no authority to issue a preliminary injunction preventing petitioners from disposing of their assets pending adjudication of Respondent's contract claim for money damages."

The lawsuit in which the injunction was issued by the trial court was against Moreton Rolleston, Jr. Living Trust and Moreton Rolleston, Jr. Individually and as Trustee of the Trust. On February 27, 1995, Moreton Rolleston, Jr. established the Trust and conveyed all of his real and personal property to the Trust. Each piece of real estate was individually conveyed by deeds by Rolleston to the Trust.

STATEMENT OF CASE

Facts Re Second Question

The judgment of the Court of Appeals of Georgia held that the Trust could not make a valid sale of real estate unless the Trust proved that it had sufficient assets to pay the damages sought in the pending lawsuit and **also sufficient assets to cover any other possible claims**. (A-8) ruling of the Court of Appeals was not contained in the order of the trial court.

This opinion of the Court of Appeals is also contrary to the established law in Georgia, which will be cited hereinafter in Argument.

The federal question regarding interstate commerce was first raised in the Petitioners'

Motion to Reconsider which was filed with the Court of Appeals of Georgia on April 20, 1999 requesting a review of the opinion of the Court of Appeals (dated April 12, 1999) which is challenged by this Petition For Writ of Certiorari. Federal question also raised in Petition for Certiorari in the Georgia Supreme Court.

ARGUMENT

First Question

The Order of the trial court granted a temporary and permanent injunction prohibiting the sale of any assets by the Trust. This order was issued in 1997 and is still in effect. This order is completely contrary to the opinion of this Court in **Grupo,** which reads as follows:

"the District Court had no authority to issue a preliminary injunction preventing petitioners from disposing of their assets pending adjudication of Respondent's contract claim for money damages".

We respectfully refer the Court to additional portions of the judgment as indicated by the page numbers.

"Respondents sought breach of contract damages of $80.9 million, and requested a preliminary injunction restraining petitioner from transferring the Toll Road Notes or Receivables (Page 3)." The District Court and the Second Circuit Court of Appeals upheld the injunction.

"It was well established, however, that, as a general rule, a creditor's bill could be brought only

by a creditor who had already obtained a judgment establishing the debt (Page 10)".

"The rule requiring a judgment was a product, not just of the procedural requirement that remedies at law had to be exhausted before equitable remedies could be pursued, but also of the substantive rule that a general creditor (one without a judgment) had no cognizable interest, either at law or in equity, in the property of his debtor, and therefore could not interfere with the debtor's use of that property (Page 11)."

Succinctly stated: **Grupo** could not be enjoined from selling its property before the creditors secured a judgment.

We submit that the **Grupo** ruling applies to the instant case and that the Trust had every right to transfer the property to anyone before Respondent secured a judgment in the trial of the case. The injunction issued by the trial court and upheld by the Court of Appeals was invalid.

ARGUMENT

Second Question

The order of the Court of Appeals constitutes impermissible restraint of trade and places a destructive burden on interstate commerce.

The Official Code of Georgia Annotated, § 18-2-22 (3) reads as follows:

"The following acts by debtors shall be fraudulent in law against **creditors** and others and as to them shall be null and void:

(3) Every voluntary deed or conveyance, not for a valuable consideration, made by a **debtor** who is **insolvent at the time of the conveyance**."

(Emphasis added)

The Court of Appeals, however, placed an even more severe requirement. The Court of Appeals held that "insolvency of the Debtor is determined by ascertaining whether he retained sufficient assets to satisfy his obligations after the transfers.(A- 8) Rolleston was aware of the pendency of the Estate's claims against him by which it sought millions of dollars in damages, and

he did not retain sufficient assets to satisfy any award against him."

No sale of real estate would be possible if the seller has pending against him a suit for damages. There is no way, prior to trial, to determine the extent of liability for such damages. There is no way to predetermine what a jury or a court will award.

To be able to sell real estate or other assets the seller will always have to prove that he had retained sufficient assets to cover pending claims and possible claims for damages. No title insurance company would issue a title policy without including an exception regarding seller's ability to pay pending or known claims for damages.

Seller would always have to retain assets equal to the stated amounts of alleged damages and also equal to claims for general damages to be determined by a jury. For instance, if seller has been sued for personal injury arising out of an automobile accident, the amounts of damages is strictly a jury question.

And lawsuits go on and on and for years in many cases.

So, while litigation proceeds, seller can not convey good, marketable title unless he is solvent and maintains, after a conveyance, sufficient assets to satisfy any damage judgment in an unknown amount.

In 1998 there were 3,702 civil lawsuits, excluding divorce, filed in the Fulton Superior

Court of Georgia. If the judgment of this court is allowed to stand, all those 3,702 defendants could not transfer good and marketable title without having assets sufficient to cover the damages sought in these lawsuits, a figure that was impossible to predetermine before trial. For instance, none of these defendants could sell his house without complying with judgment of the Court of Appeals and none of them would be able to determine in advance the amount of assets necessary to cover future damages.

Every year over 100,000 people move to the metropolitan area of the City of Atlanta. Many of these people are from out of state. Many of these people buy homes in this area. The effect of this judgment would prevent any seller, against whom a

damage suit is pending, from conveying good and marketable title to the out-of-state purchaser. This is another example of how this judgment would be a burden on interstate commerce because the sale of property in Georgia to an out-of-state purchaser would be impossible.

This judgment will produce chaos in the real estate field and would effect corporations, partnerships and trusts just as much as individual sellers.

A Georgia seller of real estate located in another state, who is subject to a lawsuit, could not pass good title because neither the seller nor the title insurance company could determine the value of assets which the seller must retain to cover any

damages. This would place an insoluble burden on interstate commerce.

How much assets would any otherwise solvent doctor need to retain to cover malpractice damages?

How much assets would a corporation need to cover multiple sex discrimination suits?

Take the case of an ordinary citizen who has an automobile wreck. He probably has no more than $500,000 coverage. Three people are killed in the wreck and three lawsuits are filed. The seller has a prior contract to sell his house. How much assets must this seller possess in order to sell his house so that the purchaser from New York can get title insurance? And if the seller doesn't have sufficient cash to cover the damages claimed (even

though the seller is solvent) who will determine the value of the assets of the seller in order for the New York purchaser to get good title. In the meantime, what happens to the sale? Nothing. Multiply that by the lawsuits filed in Fulton County in 1998.

If you erase from the opinion of the Court of Appeals that the debtor must retain sufficient assets to satisfy his obligations after the transfers, then Moreton Rolleston, Jr. was solvent at the time of the transfer of real estate from him to the Trust. Even the Respondent's (Sims Estate) own evidence showed that Rolleston, at the time of the transfer, was worth over $5 million. Their own real estate appraiser swore that Rolleston's house was worth $3 ½ million and, to top it off, the Estate originally offered to settle the case for $300,000. This offer

was made before the transfer of title from Rolleston to the Trust. Was the $300,000 the figure Rolleston should have retained as part of his assets after the transfer of real estate? The evidence showed that he retained $500,000 from the sale of German Marks.

If a seller were required to retain sufficient assets to meet damages in a pending lawsuit, would the existence of a malpractice insurance policy be considered sufficient assets? And, if so, how much insurance would the seller have to have to meet the criteria of the judgment of Georgia Court of Appeals? In this case, Rolleston had malpractice insurance with a maximum in each of six policies of $3 million dollars. Was that enough to satisfy the criteria established by this judgment?

The ruling of the Georgia Court of Appeals would create such a problem in determining the amount of assets that a defendant debtor must retain in order to convey legal title to real estate as to impose a restraint on trade and a unconstitutional burden on interstate commerce.

The Official Code of Georgia Annotated § 18-2-22 (3) (supra, pg. 8-9) has been interpreted and upheld by the Georgia Supreme Court in the following cases:

Pharr vs. Pharr ,206 Ga. 354, p. 360

Wallace, Executor, et al vs. Williams, 212 Ga. 692, p. 696

Stokes vs. McRae, et al, 247 Ga. 658, p. 659

Warren vs. Citizens National Bank of Danville, Ky, 145 Ga. 503

Gormley vs Askew, 177 Ga. 554, headnote 1

Roach vs. Roach, 212 Ga. 40, p.42

Mitchell vs. Langley, 148 Ga. 244 at page 246

Kessler vs. Veal, 182 Ga. Apps 444, at page 449

Graves vs. Horton, 132 Ga. 786

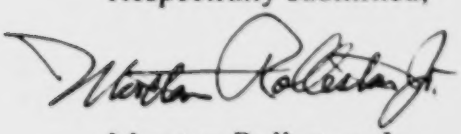
CONCLUSION

We submit that **Grupo** controls this case and, if that be true, the injunction orders issued by the trial court were improper and invalid.

We further contend that the judgment of the Court of Appeals of Georgia, to wit, that a seller must own sufficient assets after a sale equivalent to

all possible damage claims against the seller, places an undue and illegal burden on interstate commerce.

Respectfully submitted,



Moreton Rolleston, Jr.
Attorney for Respondent
Georgia Bar No. 613700

2035 Garraux Rd., N.W.
Atlanta, Ga. 30327
404/ 237-3666

APPENDIX

Appendix A

THIRD DIVISION

BLACKBURN, P.J., BARNES, J.,

SENIOR APPELLATE JUDGE

HAROLD R. BANKE

April 12, 1999

In the Court of Appeals of Georgia

A99A0195. A99A0549. A00A0823.

ROLLESTON v CHERRY, et al

BLACKBURN, Presiding Judge.

In case No. A99A0195 and Case No. A99A0549 Moreton Rolleston, Jr., individually, Moreton Rolleston, Jr., Living Trust and Moreton Rolleston, Jr., as trustee and/or beneficiary (referred to collectively as the Trust) appeals the trial court's order denying its motion for summary judgment and

granting the motion for summary judgment of the Estate of Rebecca Wight Cherry Sims and John Randolph Cherry (referred to collectively as the Estate). The Trust further contends that the trial court's dismissal of it first notice of appeal whereby it attempted to appeal the denial of a previous motion for summary judgment was erroneous. The Trust also appeals the trial court's denial of its motion to set aside the judgment. In Case No. A99A0789, the Trust appeals the trial court's order holding Rolleston in contempt of court and finding that a lease from the Trust violated the interlocutory injunction. In case No. A99A0823, the Trust appeals the trial court's order which required the posting of a $6 million supersedeas bond.

These combined cases are a continuation of litigation by Rolleston and the Trust against the

Estate. In Rolleston v. Cherry, 226 Ga. App. 750 (487 SE2d 354) (1997), this Court affirmed $5.2 million in judgments against Rolleston for professional negligence, breach of fiduciary duty, fraud, and contribution relating to his representation of Rebecca Wight Cherry Sims. After the verdict, but before the judgment was entered, Rolleston recorded deed in Fulton County and Glynn County transferring title to all of his property from his name into the name of the Moreton Rolleston, Jr. Living Trust. He also transferred all of his personal property, including cash assets into the Trust with the exception of his interest in a $500,000 certificate of deposit in German Deutsch marks, which was put into the Trust on a later date. Thereafter, the Estate filed the present case seeking to set aside the transfers of Rolleston's property into

the Trust as fraudulent. The Estate also sought and received an interlocutory injunction prohibiting any transfer of real or personal property from the Trust without approval of the court during the pendency of the underlying suit.

Thereafter, the Trust attempted to directly appeal the trial court's denial of its first motion for summary judgment; but as it was an appeal from an interlocutory order, the trial court dismissed Rolleston's notice of appeal. Subsequently, the trial court entered an order granting the Estate's motion for summary judgment and denying the Trust's third renewed motion for summary judgment. By such order, the trial court reserved the Estate's claims for permanent injunction, damages, and attorney fees for trial. These appeals arise out of

the trial court's order on the parties' motions for summary judgment.

Case Nos. A99A0195 and A99A0549

1. The Trust contends that the trial court erred in granting the Estate's motion for summary judgment in that it misapplied OCGA § 18-2-22 and it failed to consider certain evidence.

Summary judgment is proper when there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. OCGA § 9-11-56 ©. A de novo standard of review applies to an appeal from a grant of summary judgment, and we view the evidence, and all reasonable conclusions and inferences drawn from it, in the light most favorable to the nonmovant. Rice v. Huff, 221 Ga. App. 592, 593 (472 SE2d 140) (1996).

Matjoulis v. Integon Gen. Ins. Corp., 226 Ga.App. 459 (1) (486 SE2d 684) (1997).

OCGA § 18-2-22 provides:

> The following acts by debtors shall be fraudulent in law against creditors and others and as to them shall be null and void: (1) Every assignment or transfer by a debtor, insolvent at the time, of real or personal property . . . to any person . . . where any trust or benefit is reserved to the assignor or any person for him; (2) Every conveyance of real or personal estate . . . of any description had or made with intention to delay or defraud creditors, where such intention is known to the taking party; . . . and (3) Every voluntary deed or conveyance, not for a valuable consideration, made by a debtor who is insolvent at the time of the conveyance.

The Estate need not establish a claim under each division of OCGA § 18-2-22, as proof of the elements in any division requires that the conveyances to the Trust be declared null and void. See Dearing v. A.R. III, Inc, 266 Ga. 301, 303 (2) (466 SE2d 565) (1996).

(a) Rolleston argues that OCGA § 18-2-22 does not apply to the transfers he made to the Trust because, at the time of the transfers, he was not indebted to the Estate. However, this argument overlooks the precise statutory language and a long line of case authority. By its specific terms, the statute applies to "creditors and others".

These "others' include plaintiffs with claims against debtors "liable as tortfeasors, or otherwise . . .for an unascertained damage to person or property, so far as fraudulent conveyances are

concerned." Westmoreland v. Powell, 59 Ga. 256, 258 (1877). In 1895, the legislature put back in the statute the words declaring certain acts to be fraudulent in law against creditors "and others" . . . using as it source Westmoreland. Kesler v. Veal, 182 Ga. App. 444, 449 (356 SE2d 254), aff'd in part and rev'd in part, 257 Ga. 677 (362 SE2d 214) (1987). Therefore, OCGA § 18-2-22 is applicable to Rolleston and the transfers he made to the Trust. See also Mercantile Nat. Bank v. Aldridge, 233 Ga. 318, 319-320 (210 SE2d 791) (1974).

(b) Rolleston argues that OCGA § 18-2-22 (3) does not apply to the transfers he made to the Trust because he was not insolvent at the time of the transfers. However, insolvency of the debtor is

determined by ascertaining whether he retained sufficient assets to satisfy his obligations after the transfers. See Chambers v. C & S Nat. Bank, 242 Ga. 498, 501-502 (249 SE2nd 214) (1978). Rolleston was aware of the pendency of the Estate's claims against him by which it sought millions of dollars in damages, and he did not retain sufficient assets to satisfy any award against him. The evidence to which the Trust refers merely establishes the amount of assets transferred into the Trust. The amount of assets transferred into the Trust is not relevant in determining whether the debtor was solvent at the time of the transfer. Id. Furthermore, proof of Rolleston's solvency is unnecessary to establish the Estate's claim pursuant to OCGA § 18-2-22 (2). Mercantile Nat. Bank, supra.

Because the trial court did not err in granting the Estate's motion for summary judgment, it also did not err in denying the Trust's motions for summary judgment.

2. The Trust contends that the trial court erred in failing to grant its first motion for summary judgment, arguing that the Estate failed to comply with OCGA § 9-11-56 (e). By this enumeration, the Trust asserts that the Estate failed to respond to its initial motion for summary judgment with any evidence in opposition to such motion. The rust further asserts that its motion for summary judgment established a prima facie case, and that, therefore, summary judgment in its favor was demanded pursuant to OCGA § 9-11-56 (e).

The Trust's argument rests on its assertion that it had presented a prima facie case entitling it to summary judgment. However, as is shown in our discussion in Division 1, the Trust was not entitled to summary judgment as a matter of law, and therefore, the trial court did not err in denying its motions.

3. The Trust contends that the trial court erred in dismissing its initial notice of appeal of the trial court's order denying its first motion for summary judgment. However, as a direct appeal is not available from the denial of a motion for summary judgment, see OCGA § 5-6-34, the trial court did not err in dismissing the Trust's attempt to pursue such a direct appeal. See Attwell v. Lane Co., 182 Ga. App. 813, 814 (1) (357 SE2d 142)

(1987) (trial court empowered to dismiss appeal where judgment not final).

4. The Trust enumerates as error the trial court's order denying its motion to send aside the judgment and motion to dismiss the amended complaint. By this enumeration, the Trust has asserted more than one error.

It is well settled that when an appellant argues more than one error within a single enumeration, this court in its discretion may elect to review none of the errors so enumerated in violation of OCGA § 5-6-40 or elect to review any one or more of the several assertions of error contained within the single enumeration and treat the remaining assertions of error therein as abandoned.

(Citation an punctuation omitted.) Stubbs v. Harmon, 226 Ga.App. 631, 633 (2) (487 SE2d 91) (1997). We will review the first error asserted.

The record makes it clear that the Trust filed a motion to set aside the judgment after the trial court denied its first motion for summary judgment. However, as the Trust's motion was not a proper motion, because there was no judgment to set aside, the trial court's denial of such motion was also not erroneous. Therefore , the Trust's enumeration is without merit.

Case No. A99A789

5. Rolleston contends that the trial court erred in finding him and the Trust in contempt of the temporary injunction against alienation of assets by leasing real estate out of the Trust to a limited partnership.

"Whether a contempt of court has been committed in the violation of an injunctive order, and how it shall be treated, are questions for the discretion and judgment of the court that issued the order, and its discretion will not be interfered with by this court unless there is an abuse of discretion. If there by any substantial evidence from which the judge could have concluded that his order had been violated, his finding to that effect cannot be disturbed by this court, insofar as the sufficiency of the evidence is concerned."

Gen. Teamsters Local Union No. 525 v. Allied Foods, 228 Ga. 479, 483-484 (186 SE2d 527) (1971).

The temporary injunction provides that Rolleston and the Trust are "enjoined from

transferring or conveying any real or personal property without notice to and approval by this Court. This injunction provides that Rolleston and the Trust are "enjoined from transferring or conveying any real or personal property without notice to and approval by this Court. This injunction shall remain in full force and effect until further order of this Court." The interlocutory injunction was entered on July 7, 1995. Before the interlocutory injunction was entered, Rolleston created a limited partnership, the MRJR Limited Partnership (the Partnership), of which he is the sole general partner and the Trust is the sole limited partner. The record contains a lease for 100 years from the Trust to the Partnership of substantial real and personal property described in exhibits attached

to the lease. The lease was filed with the Fulton County Superior Court on August 13, 1998.

The Trust argues that because the lease did not transfer or convey title, it was not a transfer of the property as proscribed by the interlocutory injunction. However,

> a lease of lands for five years or more creates an estate for years and passes as realty in this State. Such an estate may be bought and sold as any other estate, subject to the terms and conditions of the lease. OCGA §§ 44-6-100; 44-6-102; 44-7-1.

(Punctuation omitted.) Paces Partnership v. Grant, 212 Ga. App. 621, 624, (442 SE2d 826) (1994). This type of transfer clearly violated the interlocutory injunction.

[I]f [one] is in doubt as to what acts he may or may not do under the order, he should request a modification or construction of its terms. If he proceeds under his own construction, he does so at his own peril.

Gen. Teamsters,supra at 481. Additionally, we note that "[I]t is the spirit more than the letter of the injunction to which obedience is requires." (Punctuation omitted.) Rapaport v. Buckhead Coach, 234 Ga. App. 363, 365 (2) (506 SE2d 690) (1998).

The trial court determined that no economic purpose appeared on the face of the lease because, pursuant to its terms, the Partnership was required to pay the Trust 50 percent of the net income received in the preceding year. Yet, prior to the lease, the Trust received 100 percent of the net

income. The trial court further determined that the lease was not an arms-length transaction because Rolleston was the Trustee of the Trust and also the general partner of the Partnership. Additionally, Rolleston canceled the lease a few days prior to the hearing on the Estate's motion for contempt. Therefore, the trial court did not abuse its discretion in determining that the temporary injunction was violated by the lease in question.

6. Rolleston contends that the trial court erred in holding him in contempt of court, in sentencing him to jail, and ordering him to pay a fine of $500. Rolleston's enumeration is not supported with argument or citation to authority as required by this Court's Rule 27© (2), and is, therefore, deemed abandoned.

In any event, the trial court found that "Rolleston acted with full knowledge that he was violating [its] order and [was] in willful contempt." The trial court sentenced Rolleston 'to serve ten (10) days in the common jail of Fulton County," but allowed him to purge the contempt by payment of a fine of $500. The trail court's decision in fining Rolleston was within its discretion, and we find no abuse. Therefore, Rolleston's enumeration is without merit.

7. The Trust contends that attorney fees and costs are not recoverable in an action for contempt and that the trial court erred in awarding them to the Estate. The Georgia Supreme Court has held that if a prohibition against attorney fees in contempt proceedings exists, it exists because of "constitutional and statutory limits put on the power

of the courts to punish for criminal contempt" and is therefore limited to criminal contempt actions. Minor v. Minor, 257 Ga. 706, 709 (2) (362 SE2d 208) (1987). See also 1983 Ga. Const., Art. I, Sec II, Par. IV; OCGA § 15-6-8.

"The distinction between criminal and civil contempt is that criminal contempt imposes unconditional punishment for prior acts of contumacy, whereas civil contempt imposes conditional punishment as a means of coercing future compliance with a prior court order." (Punctuation omitted.) Rapaport, supra at 364 (1). The present contempt motion is one for criminal contempt as the trial court's order punishes Rolleston for a pervious violation of the temporary injunction. In Rapaport, we held that :[a]ttorney fees are not included in the permissible sanctions,

and the Supreme Court of Georgia has held that they are not awardable in conjunction with a citation for criminal contempt." Id at 365 (3).

The Estate argues that, because the trial court specifically awarded attorney fees pursuant OCGA § 13-6-11 and not as punishment for the contempt, it did not err in making the award. The Estate distinguishes the cases cited by Rolleston by pointing out that therein, the attorney fees were awarded as either the sole punishment or as further punishment for the contempt rather than upon a separate basis. See Gen. Teamsters, supra (where defendant fined for violation of restraining order and required to pay attorney fees, court found no authority for award of attorney fees); Ragsdale v. Bryan, 235 Ga. 58 (218 SE2d 809) (1975)

("punishment assessed in the form of attorney fees . . .was improper")'; Rapaport, supra (award of attorney fees reversed where only punishment assessed for finding of criminal contempt).

The Estate's argument fails to address our specific holding in Rapaport wherein we found that attorney fees are not awardable in conjunction with a citation for criminal contempt. Id. at 365. Therein, the Court further distinguished civil contempt by noting that in that context, attorney fees were awardable where some other express authority exists. Id. at 365, n.2. Therefore, upon the authority of Rapaport we must reverse the trial court's award of attorney fees on the Estate's motion for contempt.

8. The Trust contends that the trial court erred in requiring a $6 million supersedeas bond. The Trust argues that OCGA § 5-3-24 precludes

---

This issue was previously raised by the Trust in a motion before this Court. On September 17, 1998, this Court entered an order denying the Trust's motion to reverse the trial court's imposition of a supersedeas bond. Such order is hereby vacated and this opinion substituted in its place.

the imposition of a supersedeas bond in the present case. We do not agree.

OCGA § 5-3-24 provides that

> [e]xecutors, administrators, and other trustees, when defending an action as such or defending solely the title of the estate, may enter an appeal without paying costs and giving bond and security as required by Code Section 5-3-22; but, if a judgment should be obtained against such executor, administrator, or other trustee and not the assets of the estate, he must pay costs and give security as in other cases.

However, such Code section governs appeals to superior courts from probate courts, not appeals from superior court to the Court of Appeals. OCGA § 5-6-46 governs the grant of supersedeas bonds on appeals from superior court to the Court

of Appeals. This Code section provides, in pertinent part, that "upon motion by the appellee. . . the trial court shall require that supersedeas bond be given with such surety and in such amount as the court may require." Therefore, pursuant to OCGA § 5-6-46, the trial court did not err in granting the Estate's motion for supersedeas bond.

In summary, in Case Nos. A99A0195 and A99A0549 the trial court's grant of summary judgment to the Estate and its denial of summary judgment to the Trust is affirmed. In Case No. A99A0789, the trial court's finding of contempt and punishment therefor is affirmed; however, its assessment of attorney fees is reversed. In Case No. A99A0823, the trial court's requirement of a $6 million supersedeas bond is affirmed.

Judgment in case Nos. A99A0195, A99A0549, and A99A0823 affirmed, judgment in Case No. A99A0789 affirmed in part and reversed in part. Barnes, J., and Senior Appellate Judge Harold R. Banke concur.

Appendix B

SUPREME COURT OF THE STATE OF GEORGIA

CLERK'S OFFICE

ATLANTA

DATE: September 17, 1999

Moreton Rolleston, Jr.
2035 Garraux Road, NW
Atlanta, Ga. 30327

Case No. S99C1190

MORETON ROLLESTON, JR., et al v. ESTATE OF REBECCA WIGHT CHERRY SIMS, et al.

COURT OF APPEALS CASE NO. A99A0195
A99A0549 A99A0789 A99A0823

The Supreme Court today denied the petition for certiorari in this case.

All the Justices concur.

Sincerely,

Sherie M. Welch, Clerk

Supreme Court, U.S.
FILED
NOV 3 1999
OFFICE OF THE CLERK

No. 99-575

In The

Supreme Court of the United States

MORETON ROLLESTON, JR. LIVING TRUST, ET AL.,

Petitioners,

v.

THE ESTATE OF REBECCA WIGHT CHERRY SIMS, JOHN RANDOLPH CHERRY, EXECUTOR,

Respondent.

On Petition For A Writ Of Certiorari To The Court Of Appeals Of The State Of Georgia

RESPONDENT'S BRIEF IN OPPOSITION

SHELBY A. OUTLAW
Attorney of Record for Respondent
Ga. Bar No. 555740
THE OUTLAW FIRM
315 Sycamore Street
Decatur, GA 30030
(404) 371-9588

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

PARTIES TO THE PROCEEDING

The Petitioners are Moreton Rolleston, Jr., individually, the Moreton Rolleston, Jr. Living Trust, and Moreton Rolleston, Jr. in his capacities as Grantor, Trustee and Beneficiary of the Moreton Rolleston, Jr. Living Trust.

Respondent Estate of Rebecca Wight Cherry Sims is represented by Decedent's personal representative, John Randolph Cherry, Executor.

TABLE OF CONTENTS

Page

Parties to the Proceeding i

Table of Contents ii

Table of Authorities iii

Statement of Jurisdiction 1

Georgia Statute Involved 1

Errors and Omissions in Petitioners' Statement of the Case 2

Reasons for Denying the Writ 8

Argument 9

Conclusion 15

Appendix A – Judgment on Jury Verdict, Fulton Superior Court, D81176 ..... A-1

Appendix B – Judgment on Jury Verdict, Fulton Superior Court, D97003 ..... B-1

Appendix C – Interlocutory Injunction, July 7, 1997 ..... C-1

Appendix D – Findings of Fact, Conclusions of Law and Judgment, Superior Court of Fulton County, E37496 ..... D-1

TABLE OF AUTHORITIES

Page

CASES

Aiken v. Richardson, 207 Ga. 735, 64 S.E.2d 54 (1951) 6, 12, 15

Chambers v. Citizens and Southern National Bank, 242 Ga. 498, 249 S.E.2d 214 (1978), citing *New England Mutual Life Ins. Co. v. Childs*, 185 Ga. 198, 194 S.E. 561 (1937) 14

Dye v. Georgia, 205 Ga. App. 781, 423 S.E.2d 713 (1992) 6, 12, 15

Grupo Mexicano de Desarrollo, S.A. et al. v. Alliance Bond Fund, Inc., et al., ___ U.S. ___ (Docket No. 98-231, decided June 19, 1999) ..... *passim*

Heart of Atlanta Motel v. United States, 370 U.S. 241, 85 S.Ct. 348, 13 L.Ed.2d 258 (1964) 13

Rolleston v. Cherry, 226 Ga. App. 750, 487 S.E.2d 354 (1997) 4, 12

Rolleston v. Cherry, 226 Ga. App. 908 (Table) (1997) 4

Rolleston v. Cherry, U.S. cert. den., 523 U.S. 1107, 118 S.Ct. 1677, 140 L.Ed.2d 815 (1998) 4

Rolleston v. Cherry, 466 S.E.2d 866 (1996) 5

Rolleston v. Cherry, 237 Ga. App. 733 (1999) 5, 10

Westmoreland v. Powell, 59 Ga. 256 (1877) 14

STATUTES

O.C.G.A. §18-2-22 ..... *passim*

O.C.G.A. §44-6-100 7

O.C.G.A. §44-6-102 7

O.C.G.A. §44-7-1 7

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTIONAL PROVISION

Constitution of the United States, Art. I, ¶ 8 5

FEDERAL STATUTES AND RULES

28 U.S.C. §1257(a) 1

FRCP, Rule 18(b) 11

STATEMENT OF JURISDICTION

A. The Order on Summary Judgment was entered by the Superior Court of Fulton County, State of Georgia, on July 7, 1995.

B. The Court of Appeals, State of Georgia, affirmed the trial court and rendered its opinion with all judges concurring, on April 12, 1999.

C. Respondent acknowledges that if the case below otherwise presented a proper case for certiorari, jurisdiction would be proper under 28 U.S.C. §1257(a) but denies that Petitioner presents a proper case for the grant of writ of certiorari.

GEORGIA STATUTE INVOLVED
O.C.G.A. 18-2-22

The following acts by debtors shall be fraudulent in law against creditors and others and as to them shall be null and void:

(1) Every assignment or transfer by a debtor, insolvent at the time, of real or personal property or choses in action of any description to any person, either in trust or for the benefit of or on behalf of creditors, where any trust or benefit is reserved to the assignor or any person for him;

(2) Every conveyance of real or personal estate, by writing or otherwise, and every bond, suit, judgment and execution or contract of any description had or made with intention to delay or defraud creditors, where such intention is known to

the taking party; a bona fide transaction on a valuable consideration, where the taking party is without notice or ground for reasonable suspicion of said intent of the debtor, shall be valid;

(3) Every voluntary deed or conveyance, not for a valuable consideration, made by a debtor who is insolvent at the time of the conveyance.

ERRORS AND OMISSIONS IN PETITIONERS' STATEMENT OF THE CASE

Petitioner has substantially misrepresented to this Court essential material facts in the history of this continuing litigation and the appeals thereof, either by direct misstatement or by omission. Rather than attempting to identify each specific misrepresentation or omission, Respondent hereinafter sets forth an accurate summation of the litigation between the parties with each relevant superior court order or appellate opinion referenced to the record or included in the Appendix to Respondent's Brief.

Petitioners' application for certiorari in the case at bar is the culmination of three lawsuits and numerous appeals occasioned by Petitioner Moreton Rolleston, Jr.'s professional negligence and active legal malpractice in rendering advice to Respondent's Decedent, Rebecca Wight Cherry Sims, concerning the ownership of certain accreted beach front land on St. Simon's Island, Georgia. The cases are as follows:

1985-1991 Civil Action D27179 (subsequently D81176), Superior Court of Fulton County, State of Georgia, Sandease, Ltd. and Coasthouse, Ltd., versus Rebecca

Wight Cherry Sims. Petitioner Moreton Rolleston, Jr. represented Defendant Sims in the underlying real estate transaction and counseled her not to attend the multi-million dollar closing. Her failure to attend coupled with Petitioner's inability to perform in her absence gave rise to the lawsuit for specific performance and damages. Petitioner managed to delay trial for years until he was replaced by other counsel shortly before Mrs. Sims was murdered. On March 1, 1991, six years after the initial acts of malpractice, the jury returned a verdict against Mrs. Sims' Estate in the amount of $3,800,000.00 as damages for abusive litigation. [See Respondent's Appendix "A", Judgment on Jury Verdict, Civil Action D81176, March 1, 1991.]

1992-1998 Civil Action D97003, Superior Court of Fulton County, The Estate of Rebecca Wight Cherry Sims (hereinafter "Estate") versus Petitioner Moreton Rolleston, Jr. The Estate sought damages for malpractice, fraud and fraudulent concealment, breach of fiduciary duty, indemnity and contribution as the result of Petitioner Moreton Rolleston, Jr.'s advice and actions in the underlying transaction and lawsuit (D27179 and D81176). The jury returned a verdict in favor of the Estate and against Moreton Rolleston, Jr. in the amount of $5,200,000.00 on March 22, 1995 and judgment was entered on April 7, 1995. [See Respondent's Appendix "B", Judgment on Jury Verdict D97003.] Between the rendering of the verdict and the entry of judgment, Petitioner recorded deeds transferring millions of dollars of unencumbered real estate from himself to an entity created by him one week before trial, the Moreton Rolleston, Jr. Living Trust (hereinafter "Trust"), of which he is Grantor, Trustee and Beneficiary.

Subsequently, deeds were recorded transferring the remainder of his known real estate holdings to the Trust.

1995-1999 Civil Action E37496, Superior Court of Fulton County, The Estate (Respondent herein) versus Moreton Rolleston, Jr. et al. (Petitioners herein) The case at bar was filed by the Estate against Petitioners herein on April 12, 1995 immediately upon learning of the above-referenced transfers of property in avoidance of judgment. This lawsuit petitioned the court to set aside all transfers to the Trust recorded post-judgment as fraudulent conveyances in violation of O.C.G.A. §18-2-22. The lawsuit also seeks damages arising from the tort of fraud, as well as a permanent injunction to prevent further transfers.

1995-1998 Appeals challenging the judgment in Civil Action D97003. Petitioner appealed the verdict in Civil Action D97003 to the Georgia Court of Appeals which affirmed the lower Court on March 6, 1997. *[Rolleston v. Cherry,* 226 Ga. App. 750, 487 S.E.2d 354 (1997)]. Petitioner Rolleston applied for Writ of Certiorari to the Supreme Court of Georgia, which was denied, *[Rolleston v. Cherry,* 226 Ga. App. 908 (Table) (1997)] and subsequently to the Supreme Court of the United States. The last attempted appeal was denied by this Honorable Court on May 4, 1998, conclusively establishing the award of $5.2 Million Dollars in damages in Civil Action D97003. [U.S. cert. den., 523 U.S. 1107, 118 S.Ct. 1677, 140 L.Ed. 2d 815 (1998)]

1995-1999 Appeals challenging the Injunction and summary judgment on liability in Civil Action E37496. The trial court entered a preliminary injunction on July 7,

1995 which prevented Petitioners from transferring property from the Trust to bona fide purchasers without prior approval from the Court. [See Respondent's Appendix "C", Interlocutory Injunction, July 7, 1997.] Petitioners appealed this injunction directly to the Supreme Court of Georgia which affirmed the injunction on January 22, 1996. [*Rolleston v. Cherry*, 466 S.E.2d 866 (1996)]

Following the denial of Petitioner's Petition for Writ of Certiorari to this Court in underlying Civil Action D97003, the Superior Court of Fulton County granted summary judgment to Respondent on July 7, 1998 on the issue of Petitioners' liability for fraudulent conveyances in avoidance of judgment. [See Respondent's Appendix "D", Findings of Fact, Conclusion of Law and Judgment, Superior Court of Fulton County, E37496.] The Georgia Court of Appeals affirmed the trial court on April 12, 1999, four years to the day from the filing of the suit. [See *Rolleston v. Cherry*, 237 Ga. App. 733 (1999)]. The Supreme Court of Georgia denied Petitioner's Request for Writ of Certiorari on September 17, 1999.

Petitioners' application for certiorari is predicated on two questions: whether this Court's recent decision in *Grupo Mexicano de Desarrollo, SA, et al. v. Alliance Bond Fund, Inc., et al.*, ___ U.S. ___ (Docket No. 98-231, decided June 17, 1999) renders the trial court's preliminary injunction fatally defective and whether such injunction poses an impermissible burden on interstate commerce in violation of the Commerce Clause of the United States Constitution, Const. U. S., Art I. §8. Both questions must be answered in the negative as is more fully shown hereafter.

The injunction entered by the Superior Court of Fulton County in Civil Action E37496 was in the nature of a post-judgment injunction because Petitioner had already been adjudicated liable for $5.2 Million Dollars in damages in the underlying lawsuit which his transfers were intended to avoid. Moreover, the injunction was entered in a case relying expressly on Petitioners' violation of O.C.G.A. §18-2-22, Georgia's fraudulent conveyance statute, and was not a suit in equity as distinguished from *Grupo Mexicano, supra.*

Although Petitioner claims that a federal question is also presented, he raised no constitutional issue in the trial court, and it is well-settled that a court of review will not address questions not presented in the first instance of appeal, *Dye v. Georgia,* 205 Ga. App. 781, 423 S.E.2d 713 (1992); *Aiken v. Richardson,* 207 Ga. 735, 64 S.E.2d 54 (1951). In their enumerations of error to the Court of Appeals of the State of Georgia, Petitioners contended that the trial court misapplied the statute, O.C.G.A. §18-2-22, and failed to consider certain evidence in ruling that Petitioner's conveyances were fraudulent in law. Petitioners did not raise a question of interstate commerce in their appeal to the Georgia Court of Appeals, nor was such issue addressed by that court. The Georgia Court of Appeals merely affirmed the lower court's grant of summary judgment in the Estate's favor.

In its consideration of Petitioners' arguments, this Court should be aware of Petitioner Rolleston's blatant misrepresentations of fact to this Court. Contrary to Petitioners' allegation that the Estate once offered to settle for $300,000.00, the only party to ever offer $300,000.00 was Petitioner Moreton Rolleston, Jr.'s own insurance carrier.

The Estate did make an unliquidated demand for policy limits which was rejected.

Petitioners also failed to advise this Court of their blatant violation of the interlocutory injunction, resulting in a contempt citation and a fine affirmed by the Georgia Court of Appeals. Despite the existence of the interlocutory injunction which prohibited Petitioners from transferring or conveying any property without prior court approval, within the month following the trial court's grant of final summary judgment on July 7, 1998 on the issue of liability, the Trust transferred *all* real and personal property by 100 year lease to a new entity, to wit: the Moreton Rolleston, Jr., Limited Partnership, wholly owned and controlled by Petitioner Moreton Rolleston, Jr.

Although Petitioners argued to the Court of Appeals in their Motion to Reconsider that a lease does not transfer an interest in land, Petitioner Rolleston had admitted in court on October 5, 1998 that he had obtained a purchaser for the property and Chicago Title Company had already agreed to issue good marketable title on the basis of property rights conferred by a long-term lease. It is well-settled in Georgia law that a long-term lease conveys an interest in land. O.C.G.A. §§ 44-6-100; 44-6-102; 44-7-1. Had that fraud not been discovered in time to halt the subsequent transfer, the Moreton Rolleston, Jr., Limited Partnership, of which Petitioner Rolleston is the general partner and Petitioner Rolleston Living Trust is the sole limited partner, would have been in position to convey good marketable title to a bona fide purchaser without notice and thereby defeat Respondent's judgment.

Respondent also excepts to Petitioners' misstating the date of the term of its petition as October 2000, when the petition was docketed in the October, 1999 term and is ripe for consideration in this Court's October 1999 Term.

Petitioner Moreton Rolleston, Jr.'s actions in the underlying case and appeals thereof, as set forth above and as documented in Respondent's Appendices and the present Petition to this Court are evidence of Petitioners' disregard for the facts and the law. This case does not present any question entitling Petitioners to review in this Court.

REASONS FOR DENYING THE WRIT

There are no compelling reasons for review of the lower state court's decision on writ of certiorari, and multiple reasons for denying the writ:

- Petitioner cites no conflict with any decision of the United States court of appeals or a state court of last resort or any departure from the accepted and usual course of judicial proceeding so as to call for an exercise of this Court's supervisory power;
- Petitioner cites no decision of a federal question by a state court of last resort that conflicts with another state court of last resort or of a United States court of appeals;
- Petitioner cites no important question of federal law that has not been but should be settled by this Court, or that has been decided in a way that conflicts with relevant decisions of this Court.

ARGUMENT

A. The Superior Court of Fulton County Had Express Statutory Authority to Restrain and Enjoin Petitioners From Transferring Property.

Petitioner's First Question fails to set forth any grounds for an appeal to this Court because the recently decided case, upon which Petitioners rely, has no application to the case at bar. In *Grupo Mexicano, supra,* this Court held that there was no precedent in a suit in equity to issue an injunction preventing a pre-judgment transfer of property before the entitlement to money damages is judicially established. The case at bar is founded on express statutory authority, to wit: O.C.G.A. §18-2-22, the Georgia fraudulent conveyance statute, which is in derogation of the common law and excludes this instant case from the rule of equity.

The *Grupo Mexicano, supra,* case is distinguishable on multiple levels from the case at bar. Specifically, Respondent was forced to file suit for the express purpose of setting aside transfers in order to satisfy the money judgment previously awarded. Petitioner Moreton Rolleston, Jr., an admitted multi-millionaire, transferred all of his real and personal property to a living trust wholly owned and controlled by him *after* money damages in the amount of $5.2 Million Dollars were awarded to Respondent by the jury, but *before* the judgment was signed and entered. Although the Trust's title to said property is a legal fiction, said transfers nonetheless prevented Respondent from executing on its judgment for more than four years.

Not only do Petitioners' unclean hands prevent them from seeking relief in a court of equity, it is also clear in *Grupo Mexicano, supra,* that said case has *no* application where express statutory authority exists to enjoin the acts contemplated by Petitioner.

Pursuant to O.C.G.A. § 18-2-22, *"The following conveyances shall be fraudulent in law* against *creditors and others. . . . "* in three enumerated instances. The trial court, in granting summary judgment, specifically found that it was not necessary for Respondent to prove all elements of the statute, and that it sufficed to prove any one of the three elements to entitle Respondent to have the conveyances declared null and void and set aside. The Court of Appeals of the State of Georgia confirmed that Respondent's burden of proof was satisfied by proving any one of the statutory elements. [*Rolleston v. Cherry,* 237 Ga. App. 733 (1999)]

Petitioners, in formulating their argument, addressed only the third element of the fraudulent conveyance statute, to wit:

> *Every voluntary deed or conveyance, not for a valuable consideration, made by a debtor who is insolvent at the time of the conveyance. O.C.G.A §18-2-22(3)*

Moreover, their argument failed to address the fact that the transfers by Petitioner Moreton Rolleston, Jr., were *voluntary* and entirely devoid of *consideration.* Therefore, even if Petitioner Moreton Rolleston, Jr. had been solvent at the time of the conveyances, the lack of consideration and the voluntariness of the transfers rendered them fraudulent in law.

Judge Blackburn, writing for the Court of Appeals, specifically noted that Petitioners' contention that Petitioner Rolleston was insolvent at the time of the transfers not only lacked merit, but was superfluous since Respondent had already fully satisfied the second statutory prohibition, to wit:

> *Every conveyance of real or personal estate, by writing or otherwise, and every bond, suit, judgment and execution or contract of any description had or made with intention to delay or defraud creditors, where such intention is known to the taking party; a bona fide transaction on a valuable consideration, where the taking party is without notice or ground for reasonable suspicion of said intent of the debtor, shall be valid; O.C.G.A. 18-2-22(2)*

As previously stated, the existence of the Georgia prohibition against fraudulent transfers, codified as O.C.G.A. §18-2-22, distinguishes Petitioners' claim from *Grupo Mexicano, supra,* since that case is narrowly confined to instances of pre-judgment injunction in a case founded in equity. In fact, in footnote 7, Justice Scalia, writing for this Court, specifically distinguishes the *Grupo Mexicano* case from cases arising under state fraudulent conveyance laws:

> *Insofar as Rule 18(b) [rule inapplicable to action on fraudulent conveyances] applies to such an action, the state statute eliminating the need for a judgment may have altered the common law rule that a general contract creditor has no interest in his debtor's property. Because this case does not involve a claim of fraudulent conveyance, we express no opinion on the point.* Grupo Mexicano, supra, *at 15, Footnote 7.*

In the case at bar, Respondent already held a money judgment in the amount of $5.2 Million Dollars, plus interest, against Petitioner Moreton Rolleston, Jr., when the Superior Court of Fulton County issued a preliminary injunction on July 7, 1995 in the case at bar. [Appendix "B" Judgment, D97003 and *Rolleston v. Cherry*, 226 Ga. App. 750, 487 S.E.2d 354 (1997)] Petitioners' first question is entirely without merit and presents no grounds entitling Petitioners to a Writ of Certiorari from this Court to the Court of Appeals of Georgia.

B. No Federal Question Was Timely Raised and The Opinion of The Georgia Court of Appeals Does Not Burden Interstate Commerce.

Petitioners' Second Question presents no issue for consideration by this Court because Petitioner admits that a federal question was not raised in either the trial court or the Georgia Court of Appeals until Petitioners moved for reconsideration of the Court of Appeals' opinion. (Petitioners' Brief, pp. 4, 5.)

Petitioners presently contend that the ruling of the Georgia Court of Appeals constitutes an impermissible restraint of trade and places a destructive burden on interstate commerce. Petitioners raised no such claim in the trial court, nor did they enumerate such error in their appeal of the trial court's order granting summary judgment. It is well-settled that the federal question must be raised in the first instance prior to the appearance of the case in a court of review, *Aiken v. Richardson, supra, and Dye v. Georgia, supra.* However, even had the questions been properly and timely raised, Petitioners' contention

presents no legal basis because it misstates the holding of the opinion of the Georgia Court of Appeals. In the case at bar, a judgment in excess of Five Million Dollars had already been rendered against Petitioner Moreton Rolleston, Jr. prior to his recorded transfers of real property. There was nothing uncertain about Respondent's claim, nor was there any secret that Petitioner intended to utilize the legal fiction of the Moreton Rolleston, Jr., Living Trust as a conduit to transfer real property to bona fide purchasers without notice and therefore to avoid Respondent's judgment entirely.[1]

Petitioner Moreton Rolleston, Jr. first appeared in this Court in *Heart of Atlanta Motel v. United States*, 370 U.S. 241, 85 S.Ct 348, 13 L.Ed. 2d 258 (1964). He did not hesitate in that instance to prefer his personal interests, as an owner of the Heart of Atlanta Motel, to imposing the burden of racial discrimination on interstate commerce.

Petitioners contend that the Georgia Court of Appeals has construed O.C.G.A. §18-2-22 to prevent the conveyance of good marketable title to real property by a debtor during the pendency of a lawsuit. However, this reading of the opinion completely ignores the purpose of the statute which prohibits only those conveyances wherein:

---

[1] A portion of the opinion of the Georgia Court of Appeals deals with the order of the trial court which found Moreton Rolleston, Jr., in contempt for a further attempt to avoid the judgment by transferring all of his property by 100 year lease to another wholly owned and controlled entity, the Moreton Rolleston, Jr. Limited Partnership. Petitioners did not reference this portion of the opinion in their petition.

1) The debtor, rendered insolvent by the assignment or transfer, retains any trust or benefit for himself;

2) the debtor intends the transaction to delay or defraud creditors, and the transferee has knowledge of the intent to defraud; or

3) the debtor receives no consideration for his voluntary deed or conveyance.

The Georgia Court of Appeals quite rightly pointed out that it is only necessary for the Plaintiff to satisfy one prong of the statute in order to prevail. In the case below, not only does O.C.G.A. §18-2-22 apply to the Estate as the "others" holding an unascertained amount of damage and protected by a long line of case authority[2] but also Petitioners violated all three prongs of the statute. As Trustee and as the sole income beneficiary of the Moreton Rolleston, Jr., Living Trust, Petitioner Rolleston retained all the benefit of the Trust [O.C.G.A, §18-2-22(1)]; his knowledge is imputed to the Trust as taking party because the Trust is Rolleston's alter ego [O.C.G.A. §18-2-22(2)]; and finally, Petitioners admitted in judicio that the transfers were voluntary and no consideration was paid or received [O.C.G.A. §18-2-22(3)].

It is clear that the Georgia Court of Appeals' construction of the statutory language targets only those tortfeasors whose conveyances are intended to defraud

---

[2] *Westmoreland v. Powell*, 59 Ga. 256, 258 (1877) and *Chambers v. Citizen & Southern National Bank*, 242 Ga. 498, 249 S.E.2d 214 (1978) citing *New England Mutual Life Ins. Co. v. Childs*, 185 Ga. 198, 202, 203, 194 S.E. 561 (1937).

creditors and others and that it in no way restrains transfers to bona fide purchasers in arms-length transactions made in the ordinary course of business. What is perhaps not so clear, but which is implicit in Petitioners' argument, is their effort to set up constitutional issues to allow them to delay the ultimate day of justice for the duration of yet another appeal to the Supreme Court of the United States, in the same manner as was done in the underlying judgment.

It is well-settled that a constitutional issue cannot be raised for the first time on appeal, *Dye v. Georgia, supra; Aiken v. Richardson, supra.* However, it is not necessary for this Court to reach this issue because Petitioners' argument is absurd on its face. The statutory language carves out an exception for bona fide purchasers without notice. None of the examples cited by Petitioners for their contentions that the opinion of the Court of Appeals would wreak havoc in the marketplace or create chaos in the real estate field is even remotely related to the situation in the case at bar where Petitioner Rolleston's conveyances were conveyances in name only. It is as if Rolleston transferred his billfold from his vest pocket to his pants pocket. The man who is wearing the suit is the same and he has equal possession, use and benefit of all the property therein.

CONCLUSION

Petitioners' reliance on the case of *Grupo Mexicano, supra,* is misplaced because Respondent already possessed a multi-million dollar judgment against Petitioner

Moreton Rolleston, Jr., when the trial court enjoined Petitioners from subsequent transfers. Moreover, *Grupo Mexicano, supra,* has no application to cases predicated on statutes in derogation of common law, and specifically those state statutes prohibiting fraudulent conveyances, such as O.C.G.A. §18-2-22, which Petitioners violated in its entirety.

Petitioners' second argument that the opinion of the Court of Appeals of Georgia violates the Commerce Clause of the United States Constitution is fatally flawed because no federal question was raised by Petitioners in either the trial court or the first appearance on review to the Georgia Court of Appeals. However, pretermitting the failure to timely and properly raise a federal question, Petitioners' argument is patently absurd because Respondent's claim was not uncertain, but was reduced to judgment prior to the filing of the case at bar.

The decision of the Court of Appeals of Georgia is in accordance with the law of Georgia and the Constitutions of the State of Georgia and the United States. Petitioner has failed to show that the opinion of the Court of Appeals of the State of Georgia in any way violates the Commerce Clause of the United States Constitution or deprives Petitioners of any constitutional rights. The opinion of this Court in *Grupo Mexicano, supra,* upon which Petitioners rely, is inapplicable because Respondent's case is founded on express statutory authority prohibiting fraudulent conveyances. Respondent Estate of Rebecca Wight Cherry Sims submits that for the

reasons stated above the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

SHELBY A. OUTLAW
THE OUTLAW FIRM
315 Sycamore Street
Decatur, GA 30030
(404) 371-9598

Counsel for Respondent

Dated: November 3, 1999

APPENDIX

TABLE OF CONTENTS

		Page
Appendix A	– Judgment on Jury Verdict, Fulton Superior Court, D81176	A-1
Appendix B	– Judgment on Jury Verdict, Fulton Superior Court, D97003	B-1
Appendix C	– Interlocutory Injunction, July 7, 1997	C-1
Appendix D	– Findings of Fact, Conclusions of Law and Judgment, Superior Court of Fulton County, E37496	D-1

APPENDIX A

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

COAST HOUSE, LTD. and SANDEASE, LTD., Plaintiffs, vs. JOHN RANDOLPH CHERRY, Executor of the Estate of Mrs. Rebecca W. Cherry Sims, Defendant.	CIVIL ACTION FILE NO. ~~D-27179~~ Transferred to Civil Action File No. D-81176

JUDGMENT ON JURY VERDICT

(Filed March 1, 1991)

This action came on for trial before the Court and a jury, Honorable Frank Eldridge, presiding, and the issues having been duly tried, and the jury having duly rendered its verdict; and

Plaintiffs having claimed that the sum of their verdicts designated A ($900,000.00) and B ($1,625,000.00), totalling $2,525,000.00, are concurrent with their judgment designated E ($3,000,000.00), which sum is the greater of the two concurrent amounts; and Plaintiffs having taken the position that they are entitled to full satisfaction of either to the greater amount of $3,000,000.00; and this Court having required Plaintiffs to make an election between the sum of A and B on the one hand, and E on the other, and having permitted a stand-by election; and

Plaintiffs having elected E ($3,000,000.00) over A ($900,000.00) and B ($1,625,000.00) (with an alternative or

stand-by election of A and B, only in the event that upon appeal or post-verdict ruling or order that E is set aside or reduced below the sum of A and B), which election both "primary" and "stand-by") having been authorized by this Court; and damage item D ($800,000.00) being independent and requiring no election, and Plaintiff having waived item F ($5,000.00);

IT IS ORDERED AND ADJUDGED

That the Plaintiffs Coast House, Ltd, and Sandease, Ltd. recover of the Defendant, John Randolph Cherry, Executor under the Last Will and Testament of Rebecca Wight Cherry Sims, the sum of $3,800,000.00 with interest thereon at the rate of 12% as provided by law, and its costs of this action.

In the event that item E is set aside or reduced below the sum of items A and B as above described, then, and only in that event, Plaintiff will recover of Defendant the sum of $3,335,000.00, with interest thereon at the rate of 12% as provided by law, and its costs of action.

Dated at Atlanta, Fulton County, Georgia, this the 1 day of March, 1991.

/s/ Frank M. Eldridge
Judge, Superior Court of
Fulton County, Georgia

Presented by:

/s/ Austin E. Catts
AUSTIN E. CATTS
Georgia Bar No. 0116900

ATTORNEY FOR PLAINTIFFS

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

COAST HOUSE, LTD. and SANDEASE, LTD., Individually and as Joint Ventura Partners, Plaintiffs, vs. JOHN RANDOLPH CHERRY, Executor of the Estate of Mrs. Rebecca Wight Cherry, Sims, Deceased, Defendant.	)	CIVIL ACTION FILE NO. D-81176

SPECIAL VERDICT FORM

(Filed Feb. 27, 1991)

I

We, THE JURY, find that the Plaintiffs were damaged by the Defendant's breach of contracts.

YES ✓ NO _____

If "YES". amswer [sic] each of the subparts and II below "NO".

If "NO", answer II below "YES".

A. We find that the Plaintiffs suffered damages as a direct and immediate consequence of Defendant's breach of contract for lost use of capital in the form of lost interest, expenses spent for development which did not take place, and administrative costs

caused by the delay in the amount of $900,000.

B. We find that the Plaintiffs suffered damages as a direct and immediate consequence of the Defendant's breach of contract in the form of increased development costs in the amount of $1,625,000.

~~C. We find that the Plaintiffs lost profits as a direct and immediate result of the Defendant's breach of contract in the amount of~~

$____-____$.

/s/ FME

D. We find that the Plaintiffs incurred attorneys fees and litigation expenses as a result of the bad faith conduct of the Defendant in the amount of $800,000.

E. We find that the Plaintiffs incurred damages, not including attorneys fees or expenses of litigation, by the abusive litigation tactics of the Defendant in the amount of $3,000,000.

F. We find nominal damages in the amount of $5,000.

II

We, THE JURY, find that Plaintiffs suffered no recoverable damages.

YES _____ NO ✓

This 27th day of February, 1991.

/s/ Charles E. Crowder
Foreperson

CERTIFICATE OF SERVICE

I hereby certify that I have this date served a copy of the within and foregoing JUDGMENT ON JURY VERDICT upon defendant's attorneys, Myles E. Eastwood, Esq. and Taylor W. Jones, Esq. via telecopier to (404) 872-2095 and via first-class mail with the proper postage affixed thereto addressed as follows:

Taylor W. Jones, Esq.
JONES, BROWN & BRENNAN
1900 One Georgia Center
600 W. Peachtree Street
Atlanta, Georgia 30308

Myles E. Eastwood, Esq.
JONES, BROWN & BRENNAN
1900 One Georgia Center
600 W. Peachtree Street
Atlanta, Georgia 30308

This 1st day of March, 1991.

/s/ Austin E. Catts
Austin E. Catts

6
15th April 98

Patricia Brown

APPENDIX B

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

ESTATE OF REBECCA WIGHT CHERRY SIMS, JOHN RANDOLPH CHERRY, Executor, Plaintiff,	]	CIVIL ACTION FILE NO. D97003
v.	]	
MORETON ROLLESTON, JR., Defendant.	]	

JUDGMENT ON JURY VERDICT

(Filed Apr. 7, 1995)

This action having come on for trial before the Court and a jury, the Honorable Isaac Jenrette, presiding, and the issues having been duly tried, and the jury having duly rendered its verdict (attached hereto as Exhibit "A"),

IT IS HEREBY ORDERED AND ADJUDGED

That the Plaintiff, The Estate of Rebecca Wight Cherry Sims, John Randolph Cherry, Executor, shall recover of the Defendant, Moreton Rolleston, Jr., the principal sum of FIVE MILLION ONE HUNDRED THOUSAND ($5,100,000.00) DOLLARS, plus expenses of litigation in the amount of ONE HUNDRED THOUSAND ($100,000.00) DOLLARS, together with the costs of this action and Judgment is hereby entered for said amount;

That the Plaintiff, The Estate of Rebecca Wight Cherry Sims, John Randolph Cherry, Executor, shall recover of the Defendant, Moreton Rolleston, Jr., post-judgment interest thereon at the rate of twelve percent (12%) per annum as provided by law, on the principal sum of FIVE MILLION ONE HUNDRED THOUSAND ($5,100,000.00) DOLLARS to the date of satisfaction of said principal sum and Judgment is hereby entered for said amount; and

Plaintiff filed its affidavit showing demand was made via certified mail on January 13, 1993 for unliquidated damages in the amount of One Million ($1,000,000.00) Dollars and Defendant having failed to satisfy said demand within the time required by O.C.G.A. §51-12-14, the Plaintiff, The Estate of Rebecca Wight Cherry Sims, John Randolph Cherry, Executor, shall further recover of the Defendant, Moreton Rolleston, Jr., pre-judgment interest in the amount of Two-Hundred Fifty-Two Thousand Four Hundred Ninety-Three and 15/100 ($252,493.15) Dollars, pursuant to O.C.G.A. §51-12-14, said amount being interest at the rate of twelve percent (12%) per annum running from thirty days after Plaintiff's unliquidated damages demand on January 13, 1993, to the date of Judgment on March 22, 1995. Judgment is hereby entered for said amount.

This 6th day of APR, 1995,

/s/ Isaac Jenrette
The Honorable Isaac Jenrette,
Chief Judge
Fulton County Superior Court

Presented by:

/s/ Shelby A. Outlaw
SHELBY A. OUTLAW
Georgia State Bar No. 555740

/s/ Scott M. Kaye
SCOTT M. KAYE
Georgia State Bar No. 409310

ATTORNEYS FOR PLAINTIFF
THE OUTLAW FIRM
315 Sycamore Street
Decatur, Georgia 30030
(404) 371-9588

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

ESTATE OF REBECCA WIGHT CHERRY SIMS, JOHN RANDOLPH CHERRY, Executor — CIVIL ACTION

CASE No. D-97003

Plaintiff

vs

MORETON ROLLESTON, JR.

Defendant

VERDICT

(Filed March 22, 1995)

We the jury find for the plaintiff and award damages as follows:

1.	Actual Damages	$5,100,000
	plus any interest	$ 0
2.	Expense of Litigation including attorneys fees	$ 200,000
	Total	$5,200,000

We find that punitive damages should be awarded ( ) Yes (X) No.

OR

We the jury find for the defendant. ( )

This the 22nd day of March, 1995.

/s/ James A. Robbins Jr.
FOREPERSON

APPENDIX C

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

ESTATE OF REBECCA WIGHT CHERRY SIMS, JOHN RANDOLPH CHERRY, Executor, Plaintiff, v. MORETON ROLLESTON, JR., individually, MORETON ROLLESTON, JR., LIVING TRUST, and MORETON ROLLESTON, JR. in his capacities as Trustee and/or Beneficiary, Defendants	Civil Action File No: E 37496

INTERLOCUTORY INJUNCTION

(Filed Jul. 7, 1995)

Plaintiff's Motion for Interlocutory Injunction having come on for hearing on July 6, 1995, and after reviewing the pleadings and hearing argument of counsel,

IT IS HEREBY ORDERED AND ADJUDGED that:

Defendant MORETON ROLLESTON, JR. and Defendant MORETON ROLLESTON, JR. LIVING TRUST are enjoined from transferring or conveying any real or personal property without notice to and approval by this Court. This injunction shall remain in full force and effect until further order of this Court.

SO ORDERED THIS 7th DAY OF July, 1995.

/s/ Isaac Jenrette
THE HONORABLE ISAAC JENRETTE
Judge Fulton County Superior Court

Prepared by:
Shelby A. Outlaw
Ga. Bar No. 555740

/s/ Shelby A. Outlaw
Attorneys for Plaintiff
THE OUTLAW FIRM
315 Sycamore Street
Decatur, Georgia 30030
(404) 371-9588

APPENDIX D

IN THE SUPERIOR COURT OF FULTON COUNTY

STATE OF GEORGIA

ESTATE OF REBECCA WIGHT CHERRY SIMS, JOHN RANDOLPH CHERRY, Executor, Plaintiff, v. MORETON ROLLESTON, JR., individually, MORETON ROLLESTON, JR., LIVING TRUST, and MORETON ROLLESTON, JR. in his capacities as Trustee and/or Beneficiary, Defendants	Civil Action File No: E-37496

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

(Filed July 7, 1998)

The above-referenced action having come before this Court on Plaintiff's Motion for Partial Summary Judgment on the issue of liability pursuant to O.C.G.A. §9-11-56(c) and on Defendants' Third Renewed Motion for Summary Judgment, and the Court, having received

evidence and heard argument of counsel, and upon consideration of the pleadings, answers to interrogatories and admissions on file and depositions, affidavits and evidence in the record, hereby issues its findings of fact and legal conclusions and enters judgment as follows:

FINDINGS

1.

Defendant Moreton Rolleston, Jr. (hereinafter "Defendant Rolleston") was personally served on February 20, 1992, with Plaintiff's Complaint in Civil Action D97003, Superior Court of Fulton County, Georgia.

2.

Plaintiff's Complaint sought actual damages in excess of Five Million ($5,000,000.00) Dollars for Defendant Rolleston's alleged fraud, breach of fiduciary duty, and legal malpractice and for contribution and indemnity arising out of the judgment entered against Plaintiff in Civil Action D81176, Superior Court of Fulton County, Georgia, on March 1, 1991.

3.

Said Civil Action D97003 referenced in Paragraph 1 above was tried to the jury beginning the seventh and ending on the twenty-second day of March and a verdict in the amount of $5,100,000.00 in general damages and $100,000.00 in attorney's fees was rendered on March 22, 1995.

4.

On April 7, 1995, this Court entered Judgment on Jury Verdict against Defendant Rolleston in the total amount of $5,452,493.15 including pre-judgment interest of $252,493.15 and post-judgment interest at the legal rate.

5.

On April 12, 1995, Plaintiff learned that Defendant had filed a Warranty Deed purporting to transfer to the Moreton Rolleston, Jr., Living Trust all of his right, title and interest in and to the property located at Rebel Road Estates as described more particularly in the Deed recorded March 29, 1995 in Deed Book 19415, Pp. 169-171 of the Superior Court of Fulton County, Georgia.

6.

On April 12, 1995, Plaintiff learned that Defendant had filed a Warranty Deed on March 31, 1995 purporting to transfer to the Moreton Rolleston, Jr., Living Trust all of his right, title and interest in the Lots Numbered One Thousand Seventy-two (1072) and One Thousand Seventy-three (1073) of Block Number Seventy-one (71) of Sea Island Subdivision No. 1, Glynn County, Sea Island, Georgia, being recorded in Deed Book 57-K, Folio 155, of the Superior Court of Glynn County, Georgia.

7.

On April 12, 1995, Plaintiff filed this action against Defendants Moreton Rolleston, Jr., individually, Moreton

Rolleston, Jr., Living Trust and Moreton Rolleston, Jr., in his capacities as Trustee and/or Beneficiary of said Trust, pursuant to O.C.G.A. §18-2-22 (acts fraudulent in law against creditors and others) to set aside fraudulent conveyances and for damages, imposition of a constructive trust and injunctive relief. A temporary restraining order issued immediately and Plaintiff filed Notices of Lis Pendens in all counties where Defendant Rolleston owned real property known to Plaintiff.

8.

On July 7, 1995, this Court entered an interlocutory injunction against Defendants which was affirmed on appeal by the Supreme Court.

9.

On December 15, 1997, this Court denied Defendants' Motion for Summary Judgment and denied their request for Certificate of Immediate Review to appeal on interlocutory order.

10.

On December 19, 1997, Plaintiff filed an Amended Complaint setting forth the same causes of action to set aside fraudulent conveyances under O.C.G.A. §18-2-22(1)(2) and (3) and for Permanent Injunction (Count IV), Constructive Trust (Count V), Damages (Count VI) and Attorney's Fees (Count (VII).

11.

On January 7, 1998, Defendants filed a Notice of Appeal of the Court's Order of December 15, 1997 denying Defendants' Motion for Summary Judgment.

12.

On January 27, 1998, at the call of the trial calendar, Defendants moved in open court to dismiss Plaintiff's Amended Complaint on the ground that it dismissed the original Complaint and set forth a new cause of action for fraud which was barred by a two year statute of limitations.

13.

On February 3, 1998, this Court denied Defendants' Motion to Dismiss Plaintiff's Amended Complaint and the same order denied Defendants' Motion to Vacate and Set Aside its Order of December 15, 1997 and Defendants' second (renewed) Motion for Summary Judgment and granted Plaintiff's Motion to Strike Defendants' Notice of Appeal as a nullity.

14.

On February 5, 1998, Defendants filed a notice of appeal of this Court's interlocutory order of February 3, 1998.

15.

On March 6, 1998, Plaintiff filed and served Defendants via hand delivery with its Motion for Partial Summary Judgment on the issue of the Defendants' liability for fraudulent conveyances in avoidance of debt.

16.

Defendants filed no response to Plaintiff's Motion for Partial Summary Judgment within the 30 days allowed by statute and Plaintiff filed its Motion for Grant of Unopposed Motion on April 9, 1998.

17.

On April 10, 1998, Defendants filed their third (renewed) Motion for Summary Judgment (Motion only), relying on and incorporating by reference the Brief, Affidavits, Theories of Recovery and Statement of Material Facts in Dispute originally filed in June, 1996, in support of their first motion for summary judgment on December 15, 1997. Defendants also requested oral argument on both Plaintiff's and Defendants' motions for summary judgment.

18.

This Court heard oral argument on Plaintiff's and Defendants' Motions for Summary Judgment on June 22, 1998, and Defendants renewed their argument that Plaintiff's amended Complaint dismissed the original Complaint filed April 12, 1995 and is barred by a two-year statute of limitations for the tort of fraud.

CONCLUSIONS

Defendants contend that Plaintiff dismissed its original Complaint by the filing of its Amended Complaint on December 19, 1997, which contained the language, "This Amended Complaint replaces and supersedes the original Complaint filed and served on April 12, 1995." It is a matter of statutory law that "whenever the claim or defense asserted in the amended pleadings arises out of the conduct, transaction or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading." O.C.G.A. §9-11-15(c). Plaintiff's Amended Complaint sets forth the same causes of action to set aside property transfers pursuant to O.C.G.A. §18-2-22(1), (2) and (3) as the original Complaint and they arise out of the same conduct, transaction, or occurrence as described in Plaintiff's original complaint. The court concludes that Plaintiff's Amended Complaint relates back to the original date of filing and Defendants' contention has no merit.

2.

Defendants further contend that Plaintiff's claims for relief set forth in Plaintiff's Amended Complaint are barred by a two-year statute of limitation regarding the tort of fraud. Defendants' contention is without merit in the case at bar because the amended Complaint relates back to April 12, 1995, and it is undisputed that Plaintiff filed suit the same day it discovered the transfers from Defendant Moreton Rolleston, Jr., to the Moreton Rolleston, Jr. Living Trust. Moreover, the period of limitation

applying to an equitable suit to set aside a conveyance of real property is seven years from the date of execution of the deed, unless extended by concealment of the fraud, *Stephens v. Walker,* 193 Ga. 330, 18 S.E.2d 537 (1942), *Jones v. Spindel,* 239 Ga. 68, 235 S.E.2d 486 (1977), *McCravy v. McCravy,* 244 Ga. 336, 260 S.E.2d 52 (1979). The period of limitation for actions for damages from injury to Plaintiff's property rights by virtue of Defendants' fraud is four years. O.C.G.A. §9-3-32, *Frost v. Arnaud,* 144 Ga. 26, 85 SE 1028 (1915), *Blocker v. Boswell,* 109 Ga. 230, 236, 34 SE 289 (1899). The Court concludes that the period of limitations has not expired for either an equitable action to set aside fraudulent transfers of real or personal property or for damages arising from the tort itself and that Plaintiff's Amended Complaint states valid causes of action and claims for relief.

3.

Defendants further contend that the Estate of Rebecca Wight Cherry Sims was not a creditor at the time that Defendant Rolleston created the Moreton Rolleston, Jr., Living Trust and executed the deeds of conveyance on February 27, 1995, because there had not yet been a trial (March 7-22, 1995) or judgment (April 7, 1995) rendered against Defendant Rolleston in the underlying action, so that Plaintiff was therefore not entitled to protection against fraudulent transfers under O.C.G.A. §18-2-22. Defendants' argument is an incorrect statement of the law. It is well-settled in Georgia that an action in equity to set aside a fraudulent conveyance is available under O.C.G.A. §18-2-22 to one who has only an uncertain claim. *Kesler, et. al. v. Veal, et. at.,* 182 Ga. App 444, 449,

356 S.E.2d 254 (1987) citing *Westmoreland v. Powell*, 59 Ga. 256, 258 (1877). This court previously held as a matter of law in its order denying Defendants' Motion for Summary Judgment, entered December 15, 1997, that Defendant Rolleston had knowledge of the Estate's claim at the time of the making of the deeds (February 27, 1995) and the filing of same (March 29, 1995 through April 19, 1995). Since the underlying action was filed approximately three (3) years before the deeds transferring valuable real property were executed or recorded, the Court adheres to its earlier holding that the Estate belonged to the class of "creditors and others" protected against fraudulent conveyances under O.C.G.A. §18-2-22.

4.

Defendants similarly contend that Defendant Rolleston was not insolvent at the time of transfers because his real and personal property was valued at between twelve and fourteen million dollars at the time he made the transfers on February 27, 1995 (Affidavit of Moreton Rolleston, Jr., Exhibit "J", Plaintiff's Compendium of Exhibits). The value of Rolleston's assets *prior* to the transfers is not in dispute. It is also undisputed that Rolleston conveyed *all* of his real and personal property to the Moreton Rolleston, Jr. Living Trust on February 27, 1995 (Moreton Rolleston, Jr. Living Trust, Exhibit "I". Plaintiff's Compendium of Exhibits), except for an investment in German Marks in the approximate amount of $507,000.00 which was deposited to the Wachovia Bank account titled in the name of Moreton Rolleston, Jr., Living Trust on March 10, 1995 (Affidavit of Moreton Rolleston, Jr. Exhibit "J"; Defendants' Undisputed Material

Facts, Exhibit "K"; Defendants' Status Reports, Exhibit "L"; Plaintiff's Compendium of Exhibits). It is well established in Georgia law that the test for insolvency under O.C.G.A. §18-2-22 is whether the property retained *after* the transfers is ample to satisfy the debtor's obligations. *Chambers v. Citizen & Southern National Bank*, 242 Ga. 498, 249 S.E.2d 214 (1978) citing *New England Mutual Life Ins. Co. v. Childs*, 185 Ga. 198, 202, 203, 194 S.E. 561 (1937); *Federal Land Bank v. Bush*, 179 Ga. 627, 628, 176 S.E. 639 (1934); *Drake v. Ward-Truitt Co.*, 149 Ga. 54, 56, 99 S.E. 125 (1919). Defendant Rolleston, according to his sworn affidavit and his admissions in judicio, divested himself of *all* real and personal property immediately prior to the verdict (March 22, 1995) and Judgment (April 7, 1995) by transferring it to the Living Trust and was therefore insolvent at the time of transfers as contemplated by O.C.G.A. §18-2-22(1) and (3) – having retained no property with which to satisfy the known claims of the Estate against him.

5.

Defendant Moreton Rolleston, Jr., is the Grantor, the Trustee and the Beneficiary of the Moreton Rolleston, Jr., Living Trust, which is revocable at the Grantor's will. Defendant Rolleston has admitted that he receives all income paid to the Moreton Rolleston, Jr., Living Trust and has reserved all benefit of trust property to himself during his lifetime. (Deposition excerpts, Exhibits "N" and "O", Plaintiff's Compendium of Exhibits) – thus satisfying Plaintiff's burden of proof under O.C.G.A. §18-2-22(1).

6.

Defendant Rolleston has admitted in judicio that the transfers were voluntary and without consideration (Defendants' Status Report, Exhibit "L" Plaintiff's Compendium of Exhibits) – thus satisfying Plaintiff's burden of proof under O.C.G.A. §18-2-22(3).

7.

When the Plaintiff has proven insolvency and voluntary conveyances for no consideration, the law presumes a fraudulent intent. Defendant Moreton Rolleston, Jr., Living Trust is the alter ego of Defendant Grantor Moreton Rolleston, Jr. and the knowledge of Grantor is imputed to the Trust – thus, satisfying Plaintiff's burden of proof under O.C.G.A. §18-2-22(2).

8.

Plaintiff is not required to prove all three statutory components of O.C.G.A. 18-2-22. It is sufficient to prevail if Plaintiff satisfies its burden of proof according to the terms of either (1), (2), or (3) of O.C.G.A. 18-2-22.

9.

Plaintiff having satisfied its burden of proof with respect to subsections (1), (2) *and* (3) of O.C.G.A. 18-2-22, the Court concludes that there is no genuine issue of material fact remaining for trial and Plaintiff is entitled to summary judgment as a matter of law.

JUDGMENT

Having found that there is no genuine issue of fact remaining for trial on the issue of Defendants' liability to Plaintiff for fraudulent conveyances of real and personal property in avoidance of debt and that Plaintiff is entitled to summary judgment as a matter of law on all of its claims (except for permanent injunction, damages and attorneys fees under Counts IV, VI and VII), and having further found that there is no just reason for delay of entry of judgment in favor of the Estate of Rebecca Wight Cherry Sims, the Court pursuant to O.C.G.A. §9-11-54(b) hereby directs entry of Final Judgment in favor of Plaintiff, The Estate of Rebecca Wight Cherry Sims, John Randolph Cherry Executor, and against Defendants, Moreton Rolleston, Jr., Living Trust, and Moreton Rolleston, Jr., individually, and as Trustee and Beneficiary of said Trust, on all of Plaintiffs claims (except its claims for permanent injunction, damages and attorney's fees under Counts IV, VI and VII) and on Defendants' Counterclaim, as follows:

1.

That all property transfers, known and unknown, to the Moreton Rolleston, Jr., Living Trust are hereby set aside and are null and void and of no effect and that the Moreton Rolleston, Jr., Living Trust holds title to such property (except as set forth in paragraph 2 below) and any proceeds received upon the prior disposition of such property in trust as constructive trustee for the satisfaction of debt to Plaintiff in the principal amount of $5,452,493.15, plus post-judgment interest arising out of Civil Action D97003, Superior Court of Fulton County

and of any and all outstanding claims by Plaintiff against the Defendants.

2.

That the real property deeds conveyed by Moreton Rolleston, Jr. to the Moreton Rolleston, Jr. Living Trust are null and void as to Plaintiff's judgment and other claims and are hereby set aside, as follows:

A) That certain Warranty Deed dated February 27, 1995 (filed and recorded in the clerk's office on March 29, 1995) and recorded in Deed Book 19415, Pages 169-171, of the Superior Court of Fulton County, Georgia, purporting to convey from Defendant Moreton Rolleston, Jr. to Defendant Moreton Rolleston, Jr. Living Trust, the property located as Rebel Road Estates, Fulton County, Georgia, (as described more particularly in the Warranty Deed) is hereby set aside and is null and void and of no effect, and title to said property remains in the name of Defendant Moreton Rolleston, Jr. individually.

B) That certain Warranty Deed dated February 27, 1995 (filed in the clerk's office on March 31, 1995) and recorded in Deed Book 57-K, Folio 155, of the Superior Court of Glynn County, Georgia, purporting to convey from Defendant Moreton Rolleston, Jr. to Defendant Moreton Rolleston, Jr. Living Trust, the property located at Lots Numbered One Thousand Seventy-two (1072) and One Thousand Seventy-three (1073) of Block Number Seventy-one (71) of Sea

Island Subdivision No. 1, Glynn County, Sea Island, Georgia, (as described more particularly in the Warranty Deed) is hereby set aside and is null and void and of no effect, and title to said property remains in the name of Defendant Moreton Rolleston, Jr., individually.

C) That the Warranty Deed dated February 27, 1995 (filed in the clerk's office on April 19, 1995) and recorded in Deed Book V-20, Pages 1139-1140, of the Superior Court of Macon County, North Carolina, purporting to convey from Defendant Moreton Rolleston, Jr. to Defendant Moreton Rolleston, Jr. Living Trust, the property located at Condominium Unit #702, VZ Top Mountain Villas Condominium I, Macon County, North Carolina, (as described more particularly in the Warranty Deed) is hereby set aside and is null and void and of no effect, and title to said property remains in the name of Defendant Moreton Rolleston, Jr., individually.

D) That the Warranty Deed dated February 27, 1995 (filed in the clerk's office on April 19, 1995) and recorded in Deed Book 2319, Pages 222-223, of the Superior Court of Clayton County, Georgia, purporting to convey from Defendant Moreton Rolleston, Jr. to Defendant Moreton Rolleston, Jr. Living Trust, the property located at Land Lot 116 of the 13th District of Clayton County, Georgia, (as described more particularly in the Warranty Deed) is hereby set aside and is null and void and of no effect, and title to said property remains in the name of Defendant Moreton Rolleston, Jr., individually.

3.

That Defendants' Counterclaim seeking damages for the filing of Lis Pendens Notices by Plaintiff and for abusive litigation, having been mooted by the Court's grant of summary judgment in favor of Plaintiff, is hereby DISMISSED with prejudice.

4.

That Defendants' Third Renewed Motion for Summary Judgment is hereby DENIED.

5.

That the Plaintiff's claims for permanent injunction, damages and attorney's fees under Counts IV, VI and VII are hereby reserved for trial.

6.

That the interlocutory entered July 7, 1995 remains in full force and effect until further order of this Court.

SO ORDERED this 6th day of June, 1998.

/s/ Isaac Jenrette
ISAAC JENRETTE, Judge
Superior Court of
Fulton County

Order Presented by:

/s/ Shelby A. Outlaw
Shelby A. Outlaw
Ga. Bar No. 555740
Attorney for Plaintiff
THE OUTLAW FIRM
315 Sycamore Street
Decatur, Georgia 30030
(404) 371-9588

Supreme Court, U.S.
FILED
NOV 29 1999
CLERK

No. 99-575

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2000

MORETON ROLLESTON, JR. LIVING TRUST,ET AL,
Petitioners,

vs.

ESTATE OF REBECCA WIGHT CHERRY SIMS,
JOHN RANDOLPH CHERRY, EXECUTOR,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF GEORGIA

REPLY TO BRIEF IN OPPOSITION

Moreton Rolleston, Jr.
Attorney for Petitioners
Georgia Bar No. 613700
2035 Garraux Rd., N.W.
Atlanta, Georgia 30327
404/ 237-03666

1.

The first ruling which placed an unlawful restriction on Interstate Commerce was the opinion of the Georgia Court of Appeals. Respondents challenged that ruling as soon as possible in their Motion to Reconsider (See page 4 and 5 of Petition for a Writ of Certiorari.)

2.

In Respondent's Brief in Opposition, Respondent made several references to the fact that some of the deeds from Rolleston to the Trust were recorded in 1995 after the jury trial and implied that was an error on the part of the Petitioners.

On February 27, 1995 Rolleston established the Moreton Rolleston, Jr. Living Trust by executing a trust document. To implement the Trust, on February 27,1995 Rolleston executed and delivered the deeds to all of his real estate in the presence of two witnesses, one of whom was a notary public. Under Georgia

law the deeds became valid and effective on February 27, 1995. Deeds to real estate in Georgia do not have to be recorded in order to transfer title.

> **O.C.G.A. 44-5-30** "A deed to lands must be in writing, signed by the maker and attested to by at least two witnesses. It must be delivered to the purchaser or his representative and be made on a good and valuable consideration.
>
> **Boyd vs. Sanders**, 148 Ga.839
> 98 S. E. 490
> "Valuable consideration is not necessarily required, a good consideration is sufficient."
>
> **O.C.G.A. 44-2-1**. "A deed may be recorded at any time."

Respondent's brief referred to Case No. D-81176 (A-1 in Respondents brief). D-81176 is not relevant to the issues in this case, but its inclusion in Respondent's brief illicits the following concise comment. A previous case brought by Coast House Ltd. against the Sims Estate included Rolleston as a defendant.

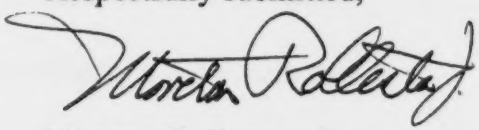
After the Georgia Supreme Court upheld all of Rolleston's Motions for Summary Judgment the first case was dismissed and refiled against the Sims Estate only as Case No. D81176. Coast House Ltd. obtained a judgment for $3,000,000 and levied on real estate worth $500,000 and agreed not to levy on the other assets of the Sims Estate if the Sims Estate would agree to file a malpractice suit against Rolleston. Coast House Ltd. agreed to pay all costs

and attorneys fees, with the provision that Coast House, Ltd. would be entitled to the first $3 million recovered in the suit against Rolleston. Such an agreement constituted champerty and barratry.

4.

All other issues raised by Respondent's brief are simply not pertinent to the issues included in the petition for writ of certiorari.

Respectfully submitted,



Moreton Rolleston, Jr.
Attorney for Petitioners
Georgia Bar No. 613700

2035 Garraux Rd., N.W.
Atlanta, Georgia 30327
404/237-3666